No. 14,523

United States Court of Appeals

For the Ninth Circuit

TRANS WORLD AIRLINES, INC.,
a corporation,
Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation, et al.,
Appellees.

APPELLANT'S REPLY TO APPELLEES' PETITION FOR A REHEARING.

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Table of Authorities Cited

Cases

Other Authorities

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The City's petition for a rehearing has two main aspects:

(1) In part it reargues certain points debated in the briefs and perfectly understood by the court, as the opinion demonstrates;

(2) In part it presents an argument never before made at any stage of the case, namely, that the contract in suit is invalid under the Civil Aeronautics Act of 1938 (49 U.S.C. 401, et seq.) and the Federal Airport Act (49 U.S.C. 1101-1119). We will not labor the point that this contention is a complete afterthought; we submit in an-

swer to it, and will show by reference to these statutes, including each provision thereof cited by the City, that they have nothing to do with business arrangements between airports and airlines such as the case at bar involves, and contain nothing in derogation of the validity of the contract in suit. Generally speaking, the Federal Airport Act provides for money grants in aid of airport construction and development; the Civil Aeronautics Act relates to such matters as certification of airlines; regulation of rates charged by air carriers to the traveling public; safety rules for flight operation and like matters.

Turning to an answer of the specific arguments made in the petition for rehearing and in the order there presented, we submit:

Pages 2-5. There is no merit in the claim that the case should be reopened because this court did not decide whether operation of the "airport, especially the common use facilities, is a public utility business." The question is immaterial; the City had statutory authority to make the contract in suit, and the contract is, therefore, binding whether the case involves a public utility relationship or not. This point was fully argued in the briefs. Concerning it, the court said (Opinion, pp. 7-8):

> "Where, however, the municipality enters into a contract pursuant to express statutory authority to contract, the courts have recognized that the specific authority to contract, insofar as this authority conflicts with the general power conferred on the municipality to regulate public utility rates, should prevail."

The two sections of the California Public Utilities Code cited in the City's petition (pp. 4-5) deal with the defini-

tion of public utilities and with the conditions under which municipalities may operate utilities outside their corporate boundaries. Both sections are immaterial because it is immaterial to the present case whether the airport or part of it is a public utility or not.

The same cases as are cited in the City's petition for rehearing (p. 3) were cited in the City's brief. All of them are of the character distinguished in the court's opinion (p. 5). They have no bearing on the validity of the contract between the City and TWA, but deal with such propositions as that municipalities can conduct airports and spend public funds for airport purposes.

Pages 5-11. The claim that this court's decision "will create a chaotic condition in the aviation industry" has no semblance of reasonable foundation. The City recognized the TWA contract for seven years before it claimed any right to alter it by exercising powers of rate regulation. During these years the airport had tremendous growth which still continues. Further, as pointed out in our briefs, the City *today disclaims power of rate regulation* over scores of enterprises operating at the airport (TWA Opening Brief, pp. 12-13, pp. 46-47; Reply Brief, p. 18). It *disclaims today* regulatory power over part of the subject matter of the contract in suit, specifically acknowledging its authority to contract with the airlines regarding shop space, hangar rentals, etc. (TWA Opening Brief, pp. 3-4). Under these circumstances "chaos" certainly will not result from the court's decision upholding the City's authority as specifically granted by State statute to contract with the airlines concerning the common use facilities.

The argument that the City "cannot discriminate or give a preference" has no application to this case. A *difference* established by a valid contract made under valid statutory authority is not *per se* unreasonable and is not a preference or *discrimination* in any invidious or illegal sense. Implicit in any grant of contracting power is that the terms of contracts made under such power may be different. Many cases to this effect were cited in TWA's reply brief (pp. 19-20) in answer to the same point of "discrimination" in the City's brief as is now repeated in the petition for rehearing.

At page 7 the City cites 49 U.S.C. 1110. This is a section in the Federal Airport Act, which statute, as said above, provided federal aid for airport development. The section quoted by the City says that airports to which such provision relates must be available for public use "without unjust discrimination." This does not advance the City's case because the differential here involved for the reasons already given and under cases already cited, is not "discrimination." Further, the Federal Airport Act has nothing to do with business arrangements of the kind in suit between airlines and cities conducting airports; to the contrary it clearly contemplates that airports to which federal aid is extended are to be managed by the local authorities.

Also on page 7 the City quotes from the Civil Aeronautics Act of 1938 (49 U.S.C. 402). Again the quotation is pointless because there is no "discrimination." Further and fundamentally, the Civil Aeronautics Act does not purport to deal with the subject matter of the case at bar, and the jurisdiction of the Civil Aeronautics Board, cre-

ated by the statute, of course extends only to matters which the statute specifies.

The City's petition then goes back to the Federal Airport Act (49 U.S.C. 1101(a)), and quotes therefrom the definition of a public airport. It is obvious from the quotation that it has no bearing on the validity of the TWA contract.

The City then returns to the Civil Aeronautics Act (49 U.S.C. 484(b)), and cites the provision that *"no air carrier"* shall give any unreasonable preference to particular persons, localities or types of traffic. Again the quoted section by its terms does not apply to this case.

On page 8 the City says that charges for the common use facilities at the airport "must of necessity be nondiscriminatory," citing three Supreme Court cases which are not in point. Each of these cases dealt with discrimination *by common carriers against shippers* and turned on express prohibitions of the Interstate Commerce Act as amended. The case at bar is not concerned with relationships between the common carrier airlines and their passengers or freight shippers. Similar considerations apply to the fourth case cited by the City on this point (*California v. United States* (1944) 320 U.S. 577 (Petition, p. 10)) which arose under the Shipping Act of 1916, and involved practices with regard to shippers, which were prohibited by that statute.

Pages 11-18. That the airport is not a muncipal affair is settled by the California cases cited by the court. The municipal affair point was argued at length in the briefs. Everything said by the City in its petition for rehearing

was said in its brief. The cases cited in the City's petition are the same cases as cited in the brief.

That section 19 of Article XI of the State Constitution (cited at page 11 of the Petition) is immaterial was, we submit, demonstrated in TWA's reply brief (pp. 11-14). Nor is it material that the Municipal and County Airport Law of 1927 (Cal. Stats. 1927, p. 485) was passed after the City first acquired an airport. The material time factor is that the statute authorizing the TWA contract was in effect in 1942 when the contract was made.

The City also argues (p. 16) that since the Legislature ratified the 1932 Charter of the City it follows that the Charter controls the State statute. The Charter, however, is controlling only with respect to municipal affairs, as is clear from the California cases cited by the court.

Pages 18-22. Here the City argues that the case, if not involving a municipal affair, must involve a "federal affair"; hence that the contract in suit would not be valid without approval by the Civil Aeronautics Board. But the Civil Aeronautics Act contains nothing to support such a contention. Obviously the provisions referred to at pages 20-21 of the City's petition do not even touch the subject matter of this suit.

The City's citation of *S. S. W. Inc. v. Air Transport Ass'n of America* (D.C.Cir. 1951) 191 F.2d 659, is not in point. There the court remanded for initial determination by the Civil Aeronautics Board a complaint charging certain air carriers with antitrust violations. The statute under which the complaint had been made provided for the filing with the Board of certain contracts *"between such air carrier and any other air carrier."*

At pages 21-22 the City refers to an opinion of the Acting Chief Counsel for the Office of Compliance advising the Civil Aeronautics Board that it had *no jurisdiction* over alleged illegality in landing charges to airlines made on a sliding scale by the Miami International Airport, the City's point being that the complainants took an appeal to the Board from this ruling. However, the Board on January 12, 1956, *affirmed the Acting Chief Counsel and dismissed the complaint* (In the Matter of the Complaint of Various Air Carriers and Foreign Air Carriers Serving Miami, Florida, The Civil Aeronautics Board, Docket No. 7324, Order No. E-9911).

Pages 23-26. Here the argument is made that if the contract in suit is not subject to utility rate legislation under the City Charter or under federal statutes, then it must be subject to regulation by the Public Utilities Commission of California. The alleged reason for this is that "Regulatory power must rest in some governmental body" (Petition, p. 23). No such generalization can be made—the basic point of the case at bar is that where a municipality has statutory power to contract and does contract, the regulatory power which it might ordinarily have over the subject matter is suspended with respect to that contract.

There is nothing in any of the state statutory provisions cited in the City's petition, and no provision anywhere in the Public Utilities Act or the California Constitution which gives the Public Utilities Commission any authority or duty with regard to the contract in suit. The Commission's power to regulate intrastate rates of common carriers by air as held in *People v. Western Air Lines, Inc.*

(1954) 42 Cal.2d 621, 268 P.2d 723, obviously has no bearing on the question before this court.

Pages 26-27. We submit that the questions in this case were correctly understood and correctly decided by the court, and that the petition should be denied.

Dated, San Francisco, California,
January 24, 1956.

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